

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 28.11.2018

PRONOUNCED ON: 01.02.2019

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1286 of 2007

&

MP.No.1 of 2007

Marimuthu

... Appellant/3rd respondent/3rd Defendant

Vs.

1.M.Palanisamy

2.P.Chellamuthu

3.P.Arjunan

4.Chinnamari

5.Kuppusamy Nadar

... Respondents 1 to 3/Appellants/Plaintiffs

... Respondents 4 & 5/Respondents 1 & 2/Defendants 1 and 2

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 23.08.2006 passed in A.S.No.8 of 2006 on the file of the Sub-Court, Dharapuram, reversing the judgment and decree dated 13.10.2004 passed in O.S.No.158 of 2002 on the file of the District Munsiff Court, Kangayam.

For Appellant : Mr.V.S.Kesavan

For RR1 to 3 : Mr.N.Manokaran

For RR4 & 5 : Given up

J U D G M E N T

The respondent nos.1 to 3 herein have filed a suit in O.S.No.158 of 2002 on the file of the learned District Munsiff, Kangayam for the relief of declaration to remove the encroachment and also for permanent injunction restraining the defendant/appellant and their men from interfering with the peaceful possession and enjoyment of the suit property. The learned District Munsif, Kangayam by the judgment and decree dated 13.10.2004 has dismissed the said suit with cost. Aggrieved by the same, the respondent nos.1 to 3 herein have filed an appeal in A.S.No.8 of 2006 on the file of the learned Subordinate Judge, Dharapuram. The learned Subordinate Judge, Dharapuram by the judgment and decree dated 23.08.2006, set aside the decree and judgment dated 13.10.2004 passed by the learned District Munsif, Kangayam and allowed the appeal.

Accordingly, a declaratory relief and the permanent injunction sought for by the respondents 1 to 3 was granted in favour of them. Feeling aggrieved, the appellant/defendant, who was the third defendant in the suit has filed the present second appeal.

2. For the sake of convenience, the parties are referred to as, as described before the trial Court.

3. The averments made in the plaint, in brief, are as follows:

The first plaintiff is the father of the second and third plaintiffs. The first plaintiff's grandfather namely Karuppana Gounder has purchased the property measuring an extent of 0.74 cents in S.No.469/B vide document No.575/1929 alongwith east west pathway right situated on the northern end of S.No.469/A and enjoying the same till his life time and continued to be enjoyed by his legal heirs. The said suit property was situated at Valliarachal Village. The said east west pathway having 6 Muzham in breadth was situated on the northern end of S.No.469/A, which runs from S.No.466 by-mas road upto LBP lower Bhavani Project Channel is the suit property herein. The property bearing S.F.Nos.469/A and 469/B are sub-divided as S.No.469/A1A, S.No.469/A1B, S.No.469/A1C, S.No.469/A1D, S.No.469/A2, S.No.469/B1 and S.No.469/B2 respectively. The first plaintiff has purchased the properties bearing S.F.Nos.469/A1C, S.No.469/A1D, alongwith suit pathway rights and enjoying the same without any disturbance from anybody. The first defendant has purchased the property bearing R.S.No.469/A1A and the second defendant has purchased the property bearing RSF.No.469/A1B. The third defendant was the proposed purchaser of S.No.469/A1B, and so also he was added as a necessary party to the proceedings. In the month of December 1999, the second defendant encroached the maximum portion of the suit pathway and planted the Coconut saplings and left a small portion to lead as a pathway inspite of the plaintiffs objections. The second defendant refused to remove those encroachments and obstructions finally in the month of December 2000. On 05.05.2002, when the defendants objected the use of suit pathway by the plaintiffs, on 12.07.2002, the second defendant suppressing the material fact tried to sell the entire extent of the property in R.S.No.469/A1B to the third defendant including the suit pathway as his absolute property. Therefore, the plaintiffs have filed this suit, praying to declare that the suit pathway was the common 6 muzham pathway for the plaintiffs and the defendants 1 & 2 and for a direction, directing the defendants 1 & 2 to remove their encroachments and obstructions over the suit pathway and also for a permanent injunction restraining the defendants in any manner interfering with the plaintiffs' peaceful possession and enjoyment of the suit property as a pathway.

4. The averments made in the written statement filed by the third defendant and adopted by the second defendant, in brief, are as follows:

The plaintiff's only have to prove their title. The track right mentioned in the document No.575/79 was not connected to the suit property. For S.No.469/A1-C, there was no track right and so also it is necessary for the plaintiffs to prove that they were purchased the track right over S.Nos.469/A1-A, A1-B and A1-C. There was no east west track from S.No.466 road. The suit mentioned track right was not enjoyed by the plaintiffs and their predecessors and there was no such track on the field. In S.No.469/A1-B in a portion in which, the plaintiffs claim that there was a track, actually, there were 40 feet height Coconut Trees and 38 years old Well in the said suit property and so also there cannot be a track over those Trees and Well. It is false to state that the second defendant attempted to sell the property in S.No.469/A1B alongwith suit track to this defendant. Across S.No.469/A1C from north to south LBP Channel runs and it turns towards east and so also there was no such track as claimed by the plaintiffs. The plaintiffs have not mentioned as to in which Survey number, they were asking the track right. But, merely they have mentioned that the track runs up to S.No.469/A1-C. In fact, the 6 muzham breadth ettery which runs north- south from the road was the track for the plaintiffs. Right from 1952, when LBP Channel was formed and prior to the second defendant purchase, for the S.No.469/A1-B, the track runs west from LBP Channel steep in the northern boundary of S.No.469/A1-C, which was previously owned by the Nachappa Gounder. Even for arguments sake if it is taken that there was a suit cart track as claimed by the plaintiffs, after the formation of LBP Channel in the year 1952, the said suit cart track was abandoned by the plaintiffs' predecessors- in-interest and so also now the plaintiffs cannot claim that right. Further, in the documents of plaintiffs predecessors-in-interest, the said right now claimed by the plaintiffs was not mentioned. The plaintiffs' claim right over for non existing track. It is false for the plaintiffs to state that the second defendant encroached the suit property in December 1999 and refused to remove the encroachments in December 2000 and that these defendants prevented the plaintiffs from using the suit property from 05.05.2002 and therefore, they prayed to dismiss the above suit.

5. Based on the above said pleadings, the learned District Munsif, Kangayam has framed the necessary issues and tried the suit. During the trial, on the side of the plaintiffs, the second plaintiff examined himself as PW1. He also examined one more witness as PW2 and 15 documents were marked as Ex.A1 to A15

on his behalf. On the side of the defendants, the third defendant was examined as DW1. Apart from that one Kuppusamy Nadar, was examined as DW2 and EXs.B1 & B2 were marked on their behalf. Further, the Report and Plan submitted by the Commissioner, were marked as Exs.C1 and C2.

6. This Court at the time of admitting the second appeal has formulated the following substantial questions of law for consideration in this Second Appeal:

(i)Whether the first Appellate Court is erred in not framing specific issues and giving a finding for reversing the judgment of the Trial Court in violation of Order 41, Rule 33 of C.P.C.?

Additional Substantial questions of law:

(i)Whether the decree and judgment of the first Appellate Court is executable one without granting the relief of mandatory injunction?

(ii)Whether the First Appellate Court construed the recitals found in Exs.A8, 12 & 13?

7.The learned counsel appearing for the appellant/third defendant would contend that the first Appellant Court without going through the contents of Exs.8, A12 & A13, came to the conclusion that the suit pathway was situated on the northern side of S.F.Nos.469/A1-A & A1-B and after setting aside the judgment and decree rendered by the learned District Munsif, Kangayam allowed the appeal partly in favour of the plaintiffs. The learned Counsel further contended that after underwenting of Lower Bhavani project Scheme, the suit schedule property was abandoned and the plaintiffs were used the pathway directly from the main road situated on the southern side of their property. Even after having sufficient pathway, only for the reasons best known to them, filed the aforesaid suit and prayed for the relief as stated in the plaint.

8. Per contra, the learned counsel for the respondents/plaintiffs would contend that from the time immemorial, the suit pathway was used by the plaintiffs as well as by his predecessors. The Country trees and the Coconut trees planted on the outer side of the suit pathway, which was mentioned by the Commissioner in his report will prove the existance of the suit pathway. Further, the sale deed stands in favour of the Great Grandfather namely Karuppanna Gounder and the other sale deeds submitted by the plaintiffs will clearly prove the existence of suit pathway. The abandoned suit pathway does not arise in this case. Further, without looking into the criteria fact that the relief of mandatory injunction granted by the First Appellate Court not at all enforceable one. Accordingly, without framing necessary issues, the First

Appellate Court has disposed of the case partly in favour of the plaintiffs, which is erroneous in law.

9. Now on considering the rival submissions, first of all we have to look into and verify whether the existence of Suit cart track was available as stated by the plaintiffs. Now on going through Ex.A8, the Sale Deed dated 29.04.1929, it is seen that as per the said sale deed, the Great Grandfather of the plaintiff Karuppanna Gounder, purchased the suit property measuring an extent of 0.74 cents in S.F.No.469 at Velliarachal Village. In the said Sale Deed, the vendors have specifically stated that there was a pathway (etteri) situated on the northern side of S.F.No.469/A, which belongs to the defendants, which can be used for reaching the property in S.F.No.469/B. Admittedly, S.F.No.469/A1-A and A1-B, which belongs to the plaintiffs was situated on the western portion of S.F.No.469/B. Accordingly, as per the above said document, prima facie the existence of suit pathway was proved on the side of the plaintiffs. Now on going through Exs.A12 & A13, it is seen that these two sale deeds were also pertaining to S.F.No.471. In the said documents also, it was mentioned that on the northern side of S.F.No.469/A, there was an 'etteri'. More than that in Ex.A13, which was also one of the sale deed pertaining to S.F.No.471, in which, it was mentioned that the existence of suit pathway was mentioned as 'etteri'. All the documents were executed before the independence.

10. According to Section 90 of the Indian Evidence Act, since all the documents referred to above were 30 years old, one cannot come to the conclusion that the contents of those documents basically a false one.

11. Now, it is evident on going through the Report and Plan submitted by the Commissioner as Exs.C1 & C2, it appears that on both sides of the suit pathway the Coconut Trees and the Country Trees were planted. He specifically stated in his Report that there was a gap in between the Coconut trees and the Country trees to the extent of 6 feet. Even though the Sale Deed now produced by the plaintiffs in favour of them was pertaining to the year 1992, the recitals found in Exs.A1, 12 and 13 and the Report submitted by the Commissioner categorically prove the existence of suit cart track.

12. The learned Trial Judge has held that there was no recitals that the suit pathway was within S.F.No.469 and absorbing the same, dismissed the suit filed by the plaintiffs.

By way of correcting the said mistake committed by the learned trial Judge, Kangeyam, the learned Subordinate Judge, Dharapuram has correctly appreciated the evidence available in the documents produced by the plaintiffs and came to the conclusion of the availability of suit pathway. If really the said suit pathway was abandoned after the LBP Channel, there was no necessity to leave the Country Trees on the northern side of the defendant field. Even after knowing of the above facts, only the third defendant purchased the suit. However, since the suit has been filed by the plaintiffs for the relief of mandatory injunction alongwith declaration and the permanent injunction, even after holding that the existence of suit pathway, the I Appellate Court rejected the claim of mandatory injunction, it is apparent since the pathway was encroached by way of putting the Country trees and Coconut trees. Without any relief of mandatory injunction, the relief granted in favour of the plaintiffs i.e., permanent injunction and the declaration cannot be enforced. However, for asking the mandatory relief, the plaintiffs have not filed any appeal. In the said circumstances, by way of answering the substantial questions of law, this Court is constrained to look into Order 41, Rule 33 of CPC, which reads as follows:

'33.Power of Court of Appeal.-

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decree:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order.'

13. The afore said Rule enumerates the object of the Rule and the object of Order 41. Rule 33 is nothing but the Appellate Court is empower to do complete justice between the parties. Further, Order 41, Rule 4 give an ample power to the

Court concerned, to make the order appropriate to meet the ends of justice. It is true that the power of the Appellate Court under Rule 33 is discretionary. However, it is a proper exercise of judicial discretion to determine all the questions urged in order to render complete justice between the parties. In this case, only the relief of mandatory injunction was granted additionally. It amounts to render the complete justice between the parties. In this regard, it is useful and necessary to refer the judgment of this Court reported in 2014(2) CTC 113, in S.A.No.495 of 2012 dated 28.02.2014 in the case of K.M. Thangavel and Others Vs. K.T.Udayakumar and Another, in paragraph no.16, it was observed as follows:

'16. As rightly pointed out on behalf of the defendants 1, 3 & 4, who are the Appellants in the Second Appeal, the above said questions framed by the Lower Appellate Court are generic and the Lower Appellate Court has not framed the correct points in precise terms for consideration in the appeal. It can be said that the framing of such general questions as points for consideration will not be sufficient compliance of the requirement of Order 41, Rule 31, CPC. Even then, it shall not be the sole ground on which the decree of the Appellate Court shall be reversed and it shall not be the sole ground on which the case shall be remanded back to the Lower Appellate Court. If the Lower Appellate Court has discussed the pleading and evidence and rendered decisions on all questions that have arisen for consideration in the Appeal, the non-framing of the exact points for consideration, as contemplated under Order 41, Rule 31, CPC, shall not be a vital flaw and such irregularity can be condoned. This has been held so by the Apex Court in G.Amalorpavam and Others Vs. R.C. Diocese of Madurai and Others 2006 (3) SCC 224.

14. So also, the substantial questions of law framed by this Court in this second appeal are already been answered in the above said decision.

15. Therefore, it is seen that for rendering complete justice, the relief of mandatory injunction also has been granted to the plaintiffs. In other words, non framing of the exact point for consideration, is not a vital flaw and the same can be contended. Accordingly, the substantial questions of law are answered in favour of the respondents 1 to 3.

16. In fine, the Second Appeal is dismissed by confirming the Judgment and decree dated 23.08.2006 passed by the learned Subordinate Judge, Dharapuram in A.S.No.8 of 2006. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

dn

To

1.The Sub-Court, Dharapuram

2.The District Munsiff Court, Kangeyam

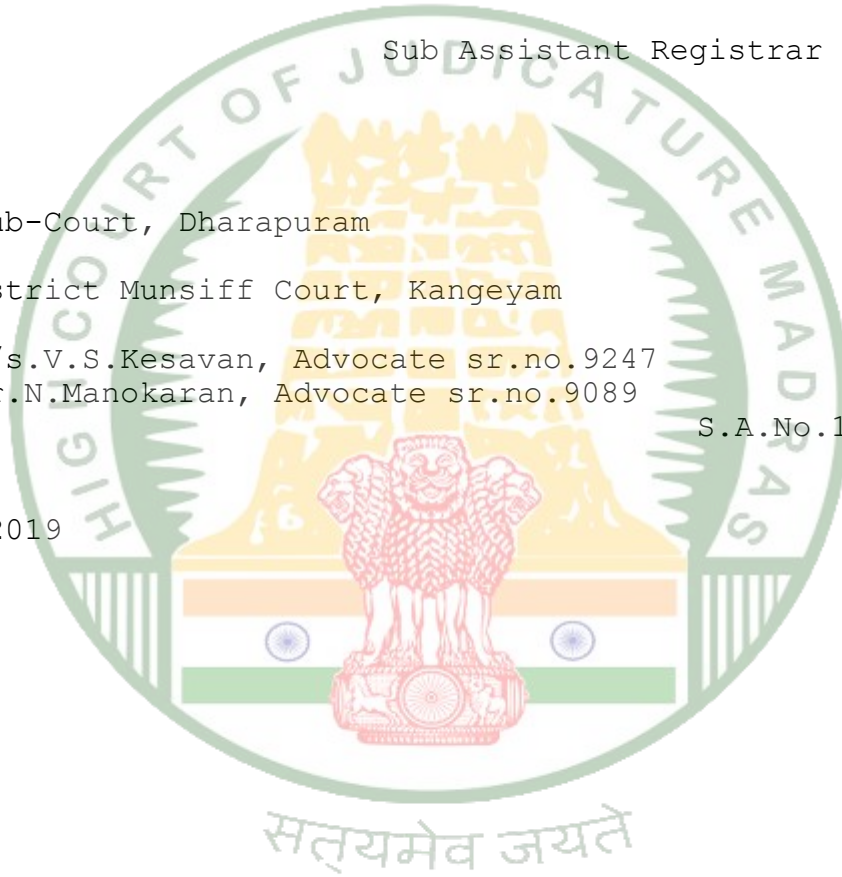
+1cc to M/s.V.S.Kesavan, Advocate sr.no.9247

+1cc to Mr.N.Manokaran, Advocate sr.no.9089

S.A.No.1286 of 2007

MR(CO)

NR 02/05/2019



WEB COPY